



March 25, 1999

Mr. Hugh W. Davis
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street
Fort Worth, Texas 76102

OR99-0842

Dear Mr. Davis:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 122928.

The City of Fort Worth (the “city”) received a request for various information generated or received since January 1, 1979, relating to Love Field, DFW Airport, Meacham Airport, Great Southwestern International Airport, and Alliance Airport. You seek to withhold the requested information under sections 552.101, 552.103, and 552.107. You have submitted representative samples of the requested information.¹

We note first that your December 22, 1998 letter seeking a decision from this office, the written request for the information at issue here, and the attachments to the latter, indicate that the instant request “renews an earlier request” from the same requestor for the same information, which was dated February 7, 1997. The February 7, 1997 request sought to “review” the records sought, and stated that “if [the records] are made available, we are willing to review the records on site.” The city responded to this February 7, 1997 request in a February 18, 1997 letter which advised the requestor that the requested records were voluminous and that

something on the order of 500 staff hours will be necessary to locate, sort, review and copy the hundreds, if not thousands, of pages of documents within

¹In reaching our conclusion, we assume that the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision No. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

the ambit of your request. Under the statute and the regulations promulgated pursuant to the statute, the cost of the request is estimated to be in excess of \$7000. It will therefore be necessary for your firm to either deposit the sum of \$5000 with the City, or provide a bond acceptable to the City Attorney in the same amount, prior to our commencing work on your request.

You advise that the requestor "never paid the deposit or followed up on its original request."

In our opinion, the city was not authorized to require the deposit or bond in response to the requestor's February 7, 1997 request to *review* the information. At the time of that request, section 552.263 of the Government Code authorized a governmental body to "require a bond for payment of costs or cash prepayment of anticipated costs for preparation of a public record if the preparation of the record would be unduly costly *and* its reproduction would cause undue hardship to the department or agency if the costs were not paid." *See* Gov't Code §§ 552.261 ("Determining Cost of Copies"), 552.262 ("Cost for Nonstandard Records"), 552.271 (no charge for access to paper records unless there is confidential information which must be redacted); 1 T. A. C. § 111.65 ("Access to Information Where Copies Are Not Requested").

In interposing an unauthorized deposit requirement for access to the records sought in the February 7, 1997 request, and in not seeking this office's decision as to whether it might withhold the requested information, the city in our opinion, waived its right to withhold any responsive records in its possession as of the date it received the February 7, 1997 request. *See* Gov't Code §§ 552.301, .302 (if governmental body fails to seek, within ten days of receiving written request, attorney general decision as to whether records may be withheld, requested records are presumed public); *Hancock v. State Bd. Of Ins.*, 797 S.W.2d 379 (Tex. App. – Austin 1990, no writ) (where governmental body does not timely request an attorney general decision, records are presumed public and may be withheld only where there is a "compelling demonstration" that the information should not be made public²). Therefore, we will consider your claims for withholding the information in the requestor's renewed request of December 11, 1998, only with respect to information that has come into the city's possession after the date of its receipt of the prior, February 7, 1997 request. Except for information made confidential by law, which must be withheld, information in the city's possession at the time of its receipt of the February 7, 1997 request must be released to the requestor.³

²Generally, discretionary exceptions such as sections 552.103 and 552.107 cannot be the basis of a "compelling demonstration." *See e.g.* Open Records Decision No. 473 (1987).

³Since you have only submitted samples of the requested information that we have determined must be released, we are unable to review all of the information at issue for information contained therein which is made confidential by law. Please note, however, that section 552.352 of the Government Code makes distribution of confidential information a criminal offense.

Section 552.103(a) excepts from required public disclosure information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991). You advise that the city has been involved in litigation to which the requested information relates "for well over a year." You supply pleadings in *City of Fort Worth v. City of Dallas, et al*, No. 48-171109-97, filed in the District Court of Tarrant County, 48th Judicial District; *City of Dallas, Texas v. Department of Transportation, et al*, No. 3:97-CV-2734-T, filed in the United States District Court for the Northern District of Texas, Dallas Division; and *Continental Airlines, Inc. and Continental Express, Inc. v. City of Dallas and City of Fort Worth*, also filed in the Dallas Division of the United States District Court for the Northern District of Texas. You indicate that the latter two cases have now been consolidated.

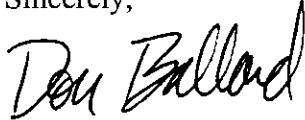
Having reviewed your arguments, the pleadings you have provided, and the sample information you submitted, we conclude that the requested information relates to pending litigation and consequently -- except as noted above with respect to information in the city's possession as of the date of the initial February 7, 1997 request -- may be withheld under section 552.103(a).

We assume, however, that none of the information we have permitted you to withhold under section 552.103(a) has previously been made available to the opposing parties in the litigation. Absent special circumstances, once information has been obtained by all parties to the litigation, either through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). To the extent the opposing parties have all seen or had access to these records, there would be no justification for now withholding such information from the requestor pursuant to section 552.103(a). Similarly, section 552.103(a) does not authorize the city to withhold materials which have already been made available to the public. Open Records Decision No. 436 (1986). The applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982), Open Records Decision No. 350 (1982).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts

presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

A handwritten signature in black ink that reads "Don Ballard". The signature is written in a cursive, slightly slanted style.

Don Ballard
Assistant Attorney General
Open Records Division

JDB/ch

Ref: ID# 122928

Enclosures: Submitted documents

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